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United States District Court, District of Columbia.

Bessye NEAL, et al., Plaintiffs,
v.
DIRECTOR, DISTRICT OF COLUMBIA DEPT. OF CORRECTIONS, et al., Defendants.

Civ. A. No. 93-2420 (RCL). | Aug. 9, 1995.

Opinion

MEMORANDUM OPINION IV

(PROCEDURES FOR ABSENT CLASS MEMBERS)

Attorneys and Law Firms

Warren Kaplan, Joseph Sellers, Christine Webber, Washington Lawyer's Committee for Civil Rights & Urban Affairs, Jeffrey Liss, Carla G. Pennington, Mary E. Gately, Piper & Marbury, Washington, D.C., for plaintiffs.

Carol Burroughs, Mark D. Back, Office of Corp. Counsel, Washington, D.C., for defendants.

LAMBERTH, District Judge.

***1** The court today issues this Memorandum Opinion IV and accompanying order covering Procedures for Absent Class Members. Separately issued today are the following opinions and accompanying orders: Memorandum Opinion I entering Final Judgment on Jury Verdicts; Memorandum Opinion II covering Equitable Relief for Individual Named Plaintiffs; and Memorandum Opinion III covering Class Wide Injunctive Relief.

I. BACKGROUND

On April 4, 1995, the jury returned a verdict in the liability phase of this case, finding that defendants had engaged in a pattern or practice of sexual harassment and retaliation in violation of §§ 703 and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* The jury also found that defendants had engaged in a custom or usage of sexual harassment and retaliation in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Based on these findings of liability, the jury on April 21, 1995, awarded compensatory damages to six of the eight named plaintiffs. Subsequently, after a bench trial, the court awarded equitable relief to seven of the named plaintiffs. Now the court will set forth its conclusions as to conduct of proceedings for absent class members.

In this next phase, current and former employees of the Department of Corrections ("DOC") will be afforded an opportunity to establish their membership in the class and their entitlement to relief in individual hearings, known as "*Teamsters* hearings."¹ Relevant issues are discussed below in the sequence in which they are likely to arise during this phase of the proceedings.

II. CLASS MEMBERSHIP

A. Notice

In order to provide relief to all individuals who were adversely affected by the pattern and practice of sexual harassment and retaliation at the DOC, the class members must be identified, located, and notified of their eligibility for relief. *See* Fed. R. Civ. P. 23(d)(2); *Sledge v. J.P. Stevens & Co., Inc.*, 585 F.2d 625, 652 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Hartman v. Wick*, 678 F. Supp. 312, 331 (D.D.C. 1988) (“Notice to potential members of the plaintiff class must satisfy due process concerns”).

Notice of this action and of these remedial proceedings should be made by hand, by mail and by publication, advising persons seeking to make claims to return notification of their interest to counsel for the class.² Class counsel will also coordinate the discovery and presentation of the claims brought by absent members of the class and will recruit other counsel to assist in the representation if and as needed.

The notice will provide the following information:

- description of the nature of this lawsuit;
- description of the jury’s verdict;
- description of the class and the types of claims that may entitle a person to membership in the plaintiffs’ class;
- description of the procedures that will be followed in this phase of the litigation; and
- *2 • statement advising persons of how to express their interest in class membership and the procedures by which they must pursue their claims.

Additionally, the notice will inform potential class members that class counsel, and other lawyers whom they may recruit, are available and willing to discuss representation of them during this phase of the litigation. The notice will also provide a telephone number which persons may use to transmit inquiries about the notice and the lawsuit. Messages will be recorded and the calls returned by counsel for the class.

Distribution of the notice shall be by the following means: First, notice shall be distributed by hand to each current active employee of the Department of Corrections. Defendants shall obtain a signed receipt from each employee and provide class counsel with copies, along with the names and addresses of all current active and inactive employees who did not sign a receipt, and the reasons therefor. Second, defendants shall post the notice on each bulletin board in each facility of the Department of Corrections and shall make available extra copies of the notification form (see below). The notice shall remain posted until the period for potential class members to return the notification form has expired. Third, defendants shall arrange for the notice to be mailed first-class to the last known address of each former employee who was employed by the Department during the period April 1, 1989 through March 1, 1995. Fourth, class counsel shall arrange for the notice to be published in the following newspapers: *Washington Post*, *Washington Times*, *Afro-American*, *Prince William Journal*, *Springfield Times Courier*, and *Prince George’s Journal*. *See Hartman*, 678 F. Supp. at 329-30 (D.D.C. 1988). Notice through newspaper publication should occur twice a week for four weeks, including publication on at least one Sunday in each paper with a Sunday edition.

A form for notice to potential class members is appended to Order IV, issued this date.

B. Notification Forms

Persons who wish to pursue claims in this phase of the litigation should complete and return in a timely fashion a notification form.

The notification form will be used solely to establish a claimant’s interest in class membership. The form, also appended to Order IV, requests the claimant’s name, home address, home and work telephone numbers, date of birth, gender, Social Security number, and the dates of employment at the DOC. It asks the claimant to identify whether she or he is currently employed and, if so, what shift she or he works; asks the claimant what positions she or he held and the location of her or his job assignments; and asks the claimant to declare that she or he was adversely affected by sexual harassment at the DOC or

was subjected to retaliation for challenging sexual harassment.

The notice to the class will advise its readers that notification forms are available from counsel for the class at the Washington Lawyers' Committee for Civil Rights and Urban Affairs. The notice directs that the notification forms be mailed to plaintiffs' counsel at the Washington Lawyers' Committee no later than December 1, 1995.

*3 Defendants have argued that potential class members should provide more detail as to the specific allegations that underlie a claim in this litigation, and that the forms be submitted under penalty of perjury. For example, defendants' proposed form would require claimants to identify specific dates of "violations," names of immediate supervisors, reasons given by the employer for actions complained of, attempts to resolve the matter, and relief sought.

The court does not intend for the initial notification form to be a component of the discovery process. Nor does the court demand express details from claimants before they have an opportunity to consult with counsel and understand the scope of their rights. The lengthy form proposed by the Department might create disincentives for claimants to come forward. They may feel intimidated by the information sought. Given the culture of retaliation at the Department, a class member may be afraid to identify names of alleged harassers and retaliators until he or she has consulted with an attorney and has been apprised of protections afforded through this litigation.

Consequently, the notification form will principally be an administrative document, which does not create a litigation weapon for either party. The court's form seeks the information necessary for determining potential class membership, and requires the claimant to state that he or she has been harmed by sexual harassment or retaliation. It does not subject claimants to a lengthy and intimidating paper interrogation. *See Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 1144 (D.N.J. 1979) (refusing to require class members to identify the manner of discrimination in an initial proof of claim form), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

The court will later require specific details of any claimant's allegations. After counsel meet and confer with claimants, those who wish to proceed shall prepare a claim summary which shall identify: (i) names of persons who allegedly committed the sexual harassment or retaliation; (ii) nature of the conduct; (iii) dates and locations; (iv) witnesses, if any; (v) complaints made by or on behalf of the claimant, formally or informally, prior to completion of the notification form; (vi) harm sustained by the claimant; and (vii) relief sought. The claim summary shall be served on defendants and filed with the court.

III. STRUCTURE OF PROCEEDINGS FOR ABSENT CLASS MEMBERS

A. Organization of Potential Class Members by Class Counsel

Upon receipt of potential class members' notification forms, counsel for the class will contact the claimants and inform them that if they wish, class counsel will secure individual counsel for them. Class counsel will represent the class on issues common to the proceedings and may also represent some individual prospective class members. Because of the potentially large number of claimants, it appears that additional attorneys will be needed to represent claimants in the pursuit of their individual claims. Class counsel will recruit and coordinate the work of these additional counsel. The court will approve the recruitment and provision of counsel to class members in this manner. Some class members may, of course, wish to retain separate counsel for their individual claims and will be so advised of that right. Counsel for the class shall coordinate their work also.³

B. Judges and Magistrates

*4 Plaintiffs originally proposed non-jury trials presided over by court-appointed special masters in sufficient number to supervise and adjudicate this next phase. *See Fed. R. Civ. P. 53*. But because defendants have not agreed to waive their Seventh Amendment right to a jury trial, non-consensual referral to a special master would be constitutionally suspect. *McCarthy v. Bronson*, 50 U.S. 136, 144 (1991). Accordingly, to expedite proceedings, the court will seek assistance from judges who have taken senior status, from visiting judges upon designation by the Chief Justice, and (with the consent of the parties) from magistrate judges.

C. Discovery Limits

It is important to afford claimants and defendants an opportunity to conduct appropriate discovery and present evidence at the hearings. However, these proceedings must be limited in duration to avoid the injustice that inordinate delay would cause. For this reason, plaintiffs have proposed the following presumptive limits on discovery: 60-day duration; 15 interrogatories; five hours for each party to conduct depositions of non-expert witnesses; no more than two fact witnesses during a hearing; and no more than two expert witness at each hearing.

Plaintiffs have also urged that potential class members who have already been deposed in this lawsuit or who testified in the liability phase of trial, be subject to more stringent discovery limits. The court is cognizant of the need for expeditious handling of these claims. Nonetheless, any limits on discovery must be imposed with great care. This matter will therefore be taken under advisement until the court has more and better information regarding the number of claims, their nature, scope, and extent.

D. Burden of Proof

The jury in the liability phase rendered a verdict establishing that the Department was culpable for its pattern or practice of harassment and/or retaliation. This “proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy.” *Teamsters*, 431 U.S. at 362. Consequently, once a claimant has shown that she or he is a member of the class, she or he is “presumptively entitled to relief.” *Id.* When an employer has been proven to be a discriminator, and adverse effect on a particular claimant has been demonstrated, the claimant’s prima facie case is complete. Both the burden of production and persuasion then shifts to the employer to show that the adverse job action or employment condition would have transpired even if the claimant had not been the victim of discrimination. *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976).

The *Day v. Mathews* formulation was updated by the D.C. Circuit five years later in *Bundy v. Jackson*, 641 F.2d 934, 953 (D.C. Cir. 1981). Combining these two precedents, the court will impose upon the parties the following burdens:

*5 First, the individual claimant must establish a prima facie case by demonstrating that she or he is a member of the class and was unfavorably affected by the Department’s pattern or practice of harassment and/or retaliation. As noted, claimant is entitled to an inference under *Teamsters*, deriving from the jury’s liability phase verdict, that any unfavorable employment incident arose from the Department’s pattern or practice. It will be sufficient for claimant to show that an adverse action or job condition eventuated with no obvious alternative explanation. For example, claimant might offer evidence that she applied for and was denied a promotion for which she was technically eligible and of which she had a reasonable expectation. The court will not require claimant to prove as part of the prima facie case that other less-qualified employees were promoted instead of claimant.

Second, the burden shifts to the Department of Corrections to demonstrate, by a preponderance of the evidence,⁴ that it had legitimate non-discriminatory reasons for the adverse action or job condition. For example, the Department might show that, despite the claimant’s technical eligibility for promotion, other better qualified employees were promoted to the job for which claimant had applied, and their better qualifications were relevant in predicting job performance. If the Department successfully meets this burden, then third, claimant still has an opportunity to prove that the Department’s purported reasons were mere pretext.

IV. COSTS AND ATTORNEYS’ FEES

Plaintiffs are entitled to an award of costs and reasonable attorneys’ fees for work expended to this date in this litigation.⁵ *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978). See also Section 706(k) of Title VII and 42 U.S.C. § 1988(b). Prevailing class members are also ordinarily entitled to attorney’s fees for all the time reasonably spent in litigating their individual claims as long as the claims are not vexatious, frivolous or brought in bad faith.⁶ *Trout v. Garrett*, 741 F. Supp. 280, 281 (D.D.C. 1990). Leaving the issue of attorney’s fees open for an individual determination as to each class member may well serve to discourage participation in further proceedings not only to the detriment of the individual claimants, but also to the class as a whole. Where the class has prevailed, each member of the class is entitled to the full measure of the benefit of that finding, including the right to attorneys’ fees and costs absent special circumstances.

The defendants shall also defray the cost of all forms of notice.⁷ See *Kyriazi*, 465 F. Supp. at 1144.

ORDER IV

(PROCEDURES FOR ABSENT CLASS MEMBERS)

LAMBERTH, District Judge.

Upon considering the submissions and oral arguments of the parties, and for the reasons more fully set forth in accompanying Memorandum Opinion IV, the court hereby ORDERS the following procedures to govern conduct of the proceedings for absent class members.

1. Class Counsel.

*6 Counsel for the plaintiff class in this matter shall continue to be the Washington Lawyers' Committee for Civil Rights and Urban Affairs, and Piper & Marbury L.L.P. Class counsel shall be responsible for representing, or arranging for the representation of, potential class members ("claimants"), recruiting additional attorneys to represent claimants, coordinating the representation of claimants, and addressing matters common to the class.

2. Notice to Potential Class Members.

(a) Notice to potential class members shall consist of the "Notice to Potential Class Members of Judgment Against the District of Columbia Department of Corrections in Sexual Harassment and Retaliation Class Action" and the "Notification Form" (collectively "notice"), which are appended to this order.

(b) The notice shall be distributed to potential class members in the following manner:

(i) Within 30 days from entry of this order, the defendants shall distribute the notice by hand to each current active employee of the Department of Corrections. Defendants shall obtain a signed statement from each employee indicating (1) that he or she has received and read the notice, and (2) the date on which he or she received the notice. Defendants shall provide class counsel with copies of the signed statements within 60 days from entry of this order. Defendants shall also provide the court and class counsel, within 60 days from entry of this order, a list of all current active and inactive employees of the Department of Corrections who have not signed such a statement and a reason why such employees did not sign a statement.

(ii) Within 75 days from entry of this order, defendants shall arrange for the notice to be delivered by first-class mail to the last known address of each current active and inactive employee of the Department of Corrections who has not signed a statement indicating that he or she had received and read the notice.

(iii) Within 30 days from entry of this order, defendants shall post the notice on each bulletin board in each facility of the Department of Corrections and shall make available extra copies of the notification form. The notice shall remain posted until the period for potential class members to return the notification form has expired.

(iv) Within 60 days from entry of this order, defendants shall arrange for the notice to be mailed by first-class mail to the last known address of each former Department of Corrections employee who was employed by the Department during the time period of April 1, 1989 through March 1, 1995.

(v) Class counsel shall arrange for the notice to be published in the following newspapers: *Washington Post*, *Washington Times*, *Afro-American*, *Prince William Journal*, *Springfield Times Courier*, and *Prince George's Journal*. The notice shall be published in a form that has been approved by the court. The notice shall be published twice a week for four weeks, in the section of the newspaper ordinarily devoted to local news. For newspapers with a Sunday edition, publication shall occur on at least one Sunday. Publication in this manner shall be completed within 60 days from entry of this order.

*7 (c) The costs of distributing and publishing the notice shall be paid by the defendants. After publication and distribution is complete, class counsel shall submit to defendants the invoices and other documentation setting forth the expenses of publication. Defendants shall pay the amounts expended by class counsel within 30 days of receipt of such documentation.

3. Notification Forms.

As directed in the notice, persons seeking to advance a claim in this action shall complete a notification form and return it to class counsel. The notification form shall be returned or bear a postmark no later than December 1, 1995. Absent good cause for late submission, no claim will be considered that is not made by December 1, 1995. Class counsel shall forward copies of completed notification forms to counsel for the defendants within five days of receipt.

4. Claim Summaries.

After class counsel, or other attorneys recruited or coordinated by class counsel, meet and confer with claimants who have submitted notification forms, each claimant who wishes to proceed shall prepare a statement setting forth the nature and substance of his or her claims ("claim summary"). The claim summary shall identify, to the extent possible, the following: (i) the names of persons who the claimant alleges committed the sexual harassment or retaliation; (ii) the conduct alleged to constitute sexual harassment or retaliation; (iii) the dates and locations of such conduct; (iv) witnesses, if any; (v) complaints relating to the sexual harassment or retaliation made by or on behalf of the claimant, formally or informally, prior to the completion of the notification form in this action; (vi) the general nature of any harm sustained by the claimant; and (vii) a general description of the relief sought by the claimant. The claim summary shall be served on defendants and filed with the court within 90 days of receipt of the claimant's notification form, unless this time is extended for good cause.

5. Proceedings for Absent Class Members Generally.

The hearings for absent class members shall be tried before juries on the issues of class membership and compensatory damages. The hearings for absent class members shall be tried to the court on claims, if any, to equitable relief. Specific rules and standards governing these proceedings are set forth below.

6. Schedule of Claims.

By March 1, 1996, class counsel shall report to the court on the number of claimants who wish to pursue claims. Class counsel shall also make recommendations to the court regarding (i) the manner in which claims should be grouped for trial, and (ii) the order in which claims should be tried. Thereafter, the court will set a schedule for the presentation of claims.

7. Equitable Remedies.

Each claimant may present a claim for back pay, front pay or reinstatement, and/or other retroactive personnel action, for the period commencing on the date when he or she first was adversely affected by sexual harassment or retaliation for opposing sexual harassment. However, in no event shall the period for which these remedies may be awarded commence earlier than (i) January 26, 1988 for claims of sexual harassment, or (ii) January 29, 1990 for claims of retaliation.

8. Compensatory Damages.

*8 Each claimant may present a claim for compensatory damages for the period commencing on the date when he or she first was sexually harassed or was the subject of retaliation for opposing sexual harassment. However, in no event may damages be awarded for the period earlier than (i) November 24, 1990, for claims of sexual harassment and retaliation arising under 42 U.S.C. § 1983; and (ii) November 21, 1991, for claims of sexual harassment and retaliation arising under Title VII of the Civil Rights Act of 1964.

9. Burdens of Proof.

(a) Each claimant shall be required to make a prima facie case by establishing, by a preponderance of the evidence, that she or he is a member of the class and was adversely affected by the Department's pattern or practice of harassment and/or retaliation. Each claimant is entitled to an inference, deriving from the jury's liability phase verdict, that any unfavorable employment incident arose from the Department's pattern or practice.

(b) To rebut a prima facie case, the defendants must prove, by a preponderance of the evidence, that a claimant is not a member of the class, or that the Department had legitimate non-discriminatory reasons for the adverse action or job condition.

(c) If the Department successfully meets its rebuttal burden, claimant still has an opportunity to prove that the Department's purported reasons were mere pretext.

10. Discovery.

Except as modified by this order and by further order of the court, discovery shall be conducted in accordance with the Federal Rules of Civil Procedure. The court will take under advisement plaintiffs' proposal for presumptive limits on discovery, as well as more stringent limits on persons who have already been deposed in this lawsuit or who testified in the liability phase of trial.

11. Nature of Jury Proceedings.

(a) Each jury shall be impaneled for approximately two weeks and shall hear as many claims as possible within that time frame. Each jury shall be given instructions consistent with those given to the jury which tried the individual claims of class representatives in the first phase of this litigation. Each jury shall deliberate and render a verdict on all claims presented to it.

(b) The court may enter further orders to regulate the content, order and length of trials as necessary.

12. Proceedings on Additional Remedies.

At the conclusion of a jury's service, the court may hear claims for equitable relief and shall make determinations consistent with the jury's verdict. In evaluating the adequacy of each claimant's proof, the court shall apply the following principles, which have been established by applicable case law governing individual hearings in Title VII cases:

(a) Difficulty in ascertaining amounts due will not defeat recovery;

(b) Unreasonable exactitude, in the light of available information, will not be required;

(c) Uncertainties or doubt as to available vacancies or amounts of back pay, amounts of front pay, and reinstatement, shall be resolved against the defendants.

13. Relief Awards.

*9 (a) Within 30 days after entry of judgment as to a claimant, defendants shall pay any amounts awarded to the claimant into an interest-bearing account administered by class counsel as agent for each claimant (hereinafter referred to as the "Relief Account"). Amounts paid into the Relief Account shall be separately identified by the name of each successful claimant.

(b) The amounts paid into the Relief Account shall be held in such account until any appeals or the rights to such appeals have been exhausted and the court approves the distribution of the amounts, including any interest earned thereon.

14. Representation in Individual Hearings

(a) Plaintiffs' class counsel will represent the class on issues common to the proceedings. Class counsel has advised the court

that, because of the likelihood of a large number of claimants, additional attorneys may be needed to represent those claimants whom class counsel are unable to represent on issues specific to their claims, including issues of class membership and the right to, and nature of, the relief requested. Class counsel will recruit and coordinate the work of these additional attorneys. Class members are entitled to retain separate counsel for their individual claims without the assistance of class counsel, but, absent compelling circumstances, the work of such separate counsel should be coordinated by class counsel.

(b) Defendants shall pay all attorneys' fees and costs reasonably incurred by prevailing plaintiffs to this date, as well as all attorneys' fees and costs reasonably incurred by prevailing claimants in the proceedings described herein, except with respect to any individual claim which is determined to have been vexatious, frivolous and in bad faith. Plaintiffs may submit their initial petition for attorneys' fees and costs within 30 days of this date. Defendants may respond within 14 days thereafter; and plaintiffs shall have seven additional days to reply.

15. Retaliation.

Defendants, their agents and their employees are enjoined from committing or endorsing retaliation against claimants for participating in this lawsuit.

SO ORDERED.

APPENDIX TO ORDER IV

NOTICE TO POTENTIAL CLASS MEMBERS OF JUDGMENT AGAINST THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS IN SEXUAL HARASSMENT AND RETALIATION CLASS ACTION

IF YOU ARE A CURRENT OR FORMER EMPLOYEE OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, READ THIS NOTICE CAREFULLY.

This notice is to inform you of a judgment in a class action lawsuit against the District of Columbia Department of Corrections, regarding sexual harassment and retaliation. If you are a current or former employee of the Department of Corrections, you may be entitled to participate in the next phase of this lawsuit.

PLEASE READ THIS NOTICE CAREFULLY.

YOUR RIGHTS MAY BE AFFECTED BY THIS LAWSUIT.

I. INTRODUCTION

In January 1994, eight individuals brought a lawsuit in the United States District Court for the District of Columbia on their own behalf and on behalf of other D.C. Department of Corrections employees, alleging that the Department of Corrections engaged in a pattern and practice of sexual harassment and retaliation against its employees. The Court approved the lawsuit as a class action on behalf of the following class of persons:

*10 (1) all current and former female employees who have been employed by the D.C. Department of Corrections between April 1, 1989 and March 1, 1995, and who were adversely affected by the practices of sexual harassment; and

(2) all current and former male and female employees who have been employed by the D. C. Department of Corrections between April 4, 1991 and March 1, 1995, and who have suffered retaliation for opposing sexual harassment.

II. THE EARLIER TRIAL

After a jury trial, the Court entered judgment finding that: (1) the D.C. Department of Corrections engaged in a pattern and practice of sexual harassment against its female employees; (2) the D.C. Department of Corrections engaged in a pattern and practice of retaliation against its male and female employees who challenged or complained of sexual harassment or who assisted others in challenging sexual harassment; and (3) sexual harassment, and retaliation for challenging or complaining of sexual harassment, were the custom or unwritten policy of the Department of Corrections, and that high ranking officials knew and went along with it.

III. NEXT STEPS AND NATURE OF CLASS MEMBERS' CLAIMS

This lawsuit is now entering its next phase. In this phase, the Court will determine: (1) whether current and former employees of the Department of Corrections with claims qualify as class members; (2) whether individual class members are entitled to money damages, and if so, in what amount; and (3) whether individual class members are entitled to other job relief, such as back pay, reinstatement, or promotions.

IF YOU WISH TO FILE A CLAIM, YOU MUST COMPLETE AND MAIL OR DELIVER THE NOTIFICATION FORM ATTACHED TO THIS NOTICE ON OR BEFORE DECEMBER 1, 1995. If you do not wish to make a claim, you do not need to do anything at all.

If you file this Notification Form, you may be required to participate in Court proceedings. This may include giving testimony at a hearing in Washington, D.C.; giving sworn testimony in a deposition taken before a court reporter and attorneys; producing documents; providing sworn written statements and information relating to your claim; and undergoing a medical examination.

IV. WHAT IS SEXUAL HARASSMENT

If you make a sexual harassment claim, you will be required to show that you were adversely affected by sexual harassment while you were employed by the Department of Corrections. The following are examples of sexual harassment:

- unwelcome speech and conduct of a sexual nature, including physical touching (although physical touching is not required);
- a sexually hostile work environment, which is a work environment where words and conduct of a sexual nature (whether or not directed at you personally) had the purpose or effect of intimidating or offending you, or otherwise making your job more difficult;
- a supervisor or superior granting or denying job conditions and benefits based on your acceptance of sexual advances;
- *11 • the granting of job benefits to another person who gives in to sexual advances, when you would otherwise have received those job benefits.

V. WHAT IS RETALIATION

If you make a claim of retaliation, you will be required to show that you were retaliated against because you challenged, opposed, or complained of sexual harassment or you assisted another employee in challenging, opposing or complaining of sexual harassment. Opposition to or complaints about sexual harassment did not necessarily have to be made formally in order for you to have a claim of retaliation. The retaliation also did not have to be taken formally. If you make a showing of retaliation, the Department of Corrections will then bear the burden of showing that the same job decision would have been made even without retaliation playing a role.

VI. LEGAL REPRESENTATION

If you are a class member, you have been represented in this lawsuit by the Washington Lawyers' Committee for Civil Rights and Urban Affairs and by the law firm of Piper & Marbury L.L.P., who are class counsel. These organizations, together with other attorneys, may continue to represent you in asserting and proving your individual claims. After you file your proof of claim form you will be contacted by class counsel, or other attorneys working with class counsel, to discuss the details of your claim and the processing of your claim. After this contact, your Notification Form will be sent to the court. If you prefer, you may retain your own counsel to represent you in asserting your claim.

VII. NOTIFICATION FORM

IF YOU BELIEVE YOU ARE A MEMBER OF THE CLASS DESCRIBED ABOVE, FILL OUT THE NOTIFICATION FORM ATTACHED TO THIS NOTICE TO THE BEST OF YOUR ABILITY AND RETURN IT TO:

Washington Lawyers' Committee
for Civil Rights and Urban Affairs
ATTN: Joseph M. Sellers
1300 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036

YOU MUST MAIL THE FORM BY DECEMBER 1, 1995.

VIII. FOR INFORMATION

You may communicate with class counsel if you have questions about this Notice, the lawsuit, or whether you are a member of the class, or if you need a copy of the Notification Form. Call the following telephone number with any such questions: [INSERT MACHINE NUMBER]. An answering machine message will instruct you to leave specific information. Class counsel will contact you shortly after you leave a message to answer your questions.

DO NOT CONTACT THE COURT OR SPECIAL MASTER WITH QUESTIONS, SINCE THEY CANNOT PROVIDE YOU WITH LEGAL ADVICE.

The information provided in this Notice is only a brief summary. All documents filed in this lawsuit are available to be reviewed at the Clerk's Office, United States District Court for the District of Columbia, 333 Constitution Avenue, N.W., Washington, DC 20001.

NOTIFICATION FORM

INSTRUCTIONS: If you currently work or previously worked at the District of Columbia Department of Corrections, between April 1, 1989 and March 1, 1995, and were harmed by the practices of sexual harassment and/or retaliation for opposing sexual harassment, please fill in the blanks below carefully. You must sign the form. (Attach additional sheets if more space is required).

Name:

Home Address:

.....
Home Phone:

Date of Birth:

Social Security No:

Dates of Employment at D.C. Department of Corrections:

From _____ Through _____

Positions held at D.C. Department of Corrections (include grade & step):

.....
.....
.....

Name: _____ Home Address: _____

Work Phone: _____ Date of Birth: _____ Home Phone: _____

Social Security No: _____ Gender (M/F): _____

Correction: From _____ Through _____ Positions held at D.C. Department of Corrections (include grade & step):

Institutions/locations of job assignments while employed by D.C. Department of Corrections:

.....
.....
.....
.....

If currently employed by D.C. Department of Corrections, identify your current institution and shift:

.....

I am filing this Notification Form because I believe that I have been harmed by sexual harassment and/or retaliation while an employee of the D.C. Department of Corrections. I declare that the responses above are true.

Date:

Signature of Person Filing Claim

IF YOU HAVE QUESTIONS CONCERNING YOUR PARTICIPATION IN THIS CLASS ACTION, YOU MAY LEAVE A MESSAGE AT AND SOMEONE WILL CONTACT YOU.

This Signed Form Must Be Delivered by, or Be Within an Envelope Post-Marked No Later than December 1, 1995 to the Following Address:

Washington Lawyers' Committee for Civil Rights and Urban Affairs

ATTN: Joseph M. Sellers

1300 Nineteenth Street, N.W.

Suite 500

Washington, D.C. 20036

DO NOT SEND THIS FORM TO ANY OTHER ADDRESS.

Footnotes

¹ See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Neal v. Director, District of Columbia Dept. of Corrections, Not Reported in F.Supp. (1995)

2 The Washington Lawyers' Committee for Civil Rights and Urban Affairs and Piper & Marbury L.L.P. have been recognized by the court as counsel for the class and will continue to serve in that capacity during this phase of the litigation.

3 In the event that class counsel declines to provide representation to any claimant, they will so advise the claimant and the court.

4 Both *Bundy*, 641 F.2d at 953, and *Day*, 530 F.2d at 1085, agree that the proper standard is clear and convincing evidence. In *Hopkins v. Price Waterhouse*, 490 U.S. 228, 252-53 (1989), the Court held that the employers' burden in a mixed motive case is preponderance of the evidence. But that litigation is distinguishable from the remedial phase of a class action where a jury has already entered a liability verdict in favor of the plaintiffs. *Berger v. Iron Workers*, 1994 WL 151292, *2 (D.D.C. April 14, 1994). To avoid a dispute over the standard of proof, plaintiffs have indicated that they are prepared to go forward in these proceedings with "preponderance of the evidence" as the defendants' burden. The court shall accede to their wish.

5 Plaintiff Jones may not be entitled to an award of costs and attorneys' fees. However, the court does not resolve this issue today.

6 The court does not resolve today the issue of attorneys' fees for claimants who do not prevail on their individual claims. This issue will necessarily be resolved when the court rules as to costs and fees for plaintiff Jones.

7 Such notice includes publication, mailings, and other forms, including a provision providing a telephone message service used during the notification period. *See Catlett v. Missouri Highway and Transp. Comm'n*, 589 F. Supp. 949, 952 (W.D. Mo. 1984) (permitting establishment of fund by defendant to pay telephone charges incurred by plaintiffs in locating class members).